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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

* * *

CONTROLLER OF THE STATE OF CALIFORNIA
AND
COUNTY TREASURER OF THE COUNTY OF
LOS ANGELES

*Petitioners,*

VS.

ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.,*

*Respondents.*

* * *

**On Petition For Writ of Certiorari**
**To The United States Court of Appeals**
**For The Fifth Circuit**

* * *

# RESPONDENTS WHITE'S AND BULLOCK'S BRIEF IN OPPOSITION

* * *

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## QUESTION PRESENTED

Whether a federal district court has jurisdiction under the Federal Interpleader Act over an action brought by an administrator of an estate against the taxing officials of the State of Texas, the State of California and the County of Los Angeles, all of whom seek to impose domicile-based death taxes on the estate?

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# RESPONDENTS WHITE'S AND BULLOCK'S BRIEF IN OPPOSITION

* * *

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[1]In the lower courts, this case was properly styled *Lummis v. White.* Since the issues presented here involve Petitioners' objections to the jurisdiction of the action filed by plaintiff Lummis, the appropriate style of this proceeding should be *Cory v. Lummis.* That style would have appeared on this brief but for the possible confusion it might have caused the Court. Petitioners' reasons for manipulating the style in this fashion are discussed, *infra,* at pp. 4-5 and 12-13 n.6.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Mark White, the Attorney General of Texas, on behalf of himself and Bob Bullock, the Comptroller of Public Accounts of Texas, and respectfully requests that the Court deny the petition for writ of certiorari.

## JURISDICTION

Petitioners' assertion is correct that the Court under 28 U.S.C. §1254(1) has jurisdiction over the judgment entered by the United States Court of Appeals for the Fifth Circuit.

## STATEMENT OF THE CASE

The seeds of this lawsuit sprouted from the grave of an abortive original action filed by the State of California on November 11, 1977. *California v. Texas*, 437 U.S. 601 (1978). That original action, in turn, had evolved from lengthy probate court litigation in Houston over the domicile of Howard Hughes. Following sixteen months of intensive discovery and trial preparation in the Texas case -- during which time Petitioners gave no indication that they intended to press any domicile claim with respect to Hughes -- California emerged on the eve of the Houston trial and attempted to barter access to this Court's original jurisdiction in return for a chance to collect most of its death taxes regardless of the merits of a California domicile claim.[2]

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[2]As the Court may recall, the primary agreement between California and the Hughes estate was contingent upon this Court's exercise of original jurisdiction over California's suit against Texas. It provided that California would receive 2% of the federal net taxable estate if this Court accepted jurisdiction and determined that Hughes was a domiciliary of Texas at his death. California was to

*(footnote continued on following page)*

This Court properly refused to enjoin the Texas domicile trial. *California v. Texas*, order no. A-433, 434 U.S. 993 (Dec. 12, 1977). That trial lasted eleven weeks and resulted in a jury verdict, and, subsequently, a final judgment, that Hughes died domiciled in Texas. Respondent Lummis and one potential legatee appealed from that judgment.

California's motion for leave to file an original action was unanimously denied on June 22, 1978. *California v. Texas*, 437 U.S. 601 (1978). In response to the concurring opinions accompanying that decision, the Hughes estate filed this interpleader action in the United States District Court for the Western District of Texas, Austin division, on July 14, 1978. The District Court promptly restrained all parties from proceeding with Hughes domicile litigation in any other forum. On August 3, 1978, the Texas taxing officials, respondents White and Bullock, filed a motion to dismiss, asserting primarily that the action was barred by the Eleventh Amendment and the doctrine of collateral estoppel.

In the fall of 1978, Petitioners, who had obtained an extension of time to respond to the original complaint, persuaded the District Court that issues of joinder and venue should be resolved prior to a determination of subject matter jurisdiction. Petitioners then filed two companion motions. The first they accurately describe as a

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*footnote continued from previous page)*

receive 18% of the federal net taxable estate if this Court determined that Hughes was domiciled *anywhere* other than Texas. A supplemental letter agreement also obligated the Hughes estate to furnish California with copies of pleadings, depositions and documentary evidence relevant to domicile, along with providing its attorneys for consultation to aid California in its suit against Texas. The texts of these agreements were set forth as appendices "E" and "F" to Texas' brief in opposition filed in *California v. Texas, supra.*

motion to join some twenty-two alleged heirs as defendants. (Pet. for Cert. 4). The second is incorrectly portrayed as a lofty, magnanimous motion brought solely to transfer the action to a "neutral forum," the District of Colorado. (*Id.*). Petitioners have neglected to inform this Court that they alternatively sought in that motion to transfer the case to Los Angeles. In November of 1978, the District Court denied Petitioners' motions to add parties and change venue.

Unable to effect a transfer of the case, Petitioners filed a motion to dismiss in February of 1979, based upon grounds similar to those asserted earlier by respondents White and Bullock. The District Court granted the motions to dismiss. *Lummis v. White*, 491 F. Supp. 5 (W.D.Tex. 1979). Respondent Lummis appealed, and Petitioners cross-appealed, seeking a transfer of the case to a federal district court in Colorado. The Court of Appeals reversed the finding of no jurisdiction but affirmed the denial of Petitioners' motions to add parties and change venue. *Lummis v. White*, 629 F.2d 397 (5th Cir. 1980).

Having again failed in their attempt to transfer the case to another district court, Petitioners filed with this Court both a second motion for leave to file an original action against Texas and a petition for certiorari. Now preferring to proceed in an original action, Petitioners have made certain changes to help achieve that goal. First, they alter their earlier position and argue for the first time that *no* district court has jurisdiction over this action because 28 U.S.C. §1251(a)(1) vests original jurisdiction exclusively with this Court. (Pet. for Cert. 7-9). Second, California has revised its inheritance tax laws in a manner which Petitioners now assert undercuts the jurisdictional basis of an interpleader action in district court. (Pet. for Cert. 18-23). And, finally, Petitioners manipulate the style of the case – which had been "*Lummis v. White*" in the

lower courts, and here should logically be "*Cory v. Lummis*" -- to emphasize their position that this is a suit between states.

## REASONS FOR DENYING THE WRIT

### I.

### THE JURISDICTIONAL HOLDING BELOW, BASED UPON UNIQUE, NOW REPEALED, PROVISIONS OF CALIFORNIA TAX LAW, INVOLVES NO ISSUE OF RECURRING IMPORTANCE.

The Court of Appeals based jurisdiction under 28 U.S.C. §1335 upon the diverse citizenships of plaintiff Lummis and defendant Alvord, the County Treasurer of the County of Los Angeles. *Lummis v. White, supra,* 629 F.2d at 402-403. Recent changes in California inheritance tax law[3] eliminating county treasurers from the tax collection process virtually insure that the jurisdictional decision below will be limited to the facts of this case. That decision provides a sound, though not broad, jurisdictional basis for resolving this dispute, which is itself factually and procedurally unique. This

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[3]Under California law in force at the time Hughes died and the time this interpleader action was filed, Alvord would collect any inheritance tax due from the Hughes estate and retain for the County a percentage of the amount so collected. *See* Calif. Rev. & Tax. Code §§14104, 14795 (1979). In the summer of 1980 -- after oral argument, but prior to a decision in the Fifth Circuit -- California passed a bill, which became effective on January 1, 1981, deleting the role of county treasurers in the tax collection process. (App. to Pet. for Cert. 38i). Petitioners made no effort to apprise the Court of Appeals about this revision prior to its decision and first did so on January 15, 1981 -- only after their petition for rehearing *en banc* had been denied -- in an out-of-time petition for rehearing that the Fifth Circuit refused to file.

Court should decline Petitioners' invitation to fashion a broad remedy for resolving hypothetical domicile-based death tax disputes which might occur in the future. (Pet. for Cert. 14-15). Precedent and logic counsel against utilizing this dispute as a springboard to reach lofty constitutional and statutory questions not raised by this case.

As a preliminary matter, it is necessary to dispose of Petitioners' argument that these recent changes in California inheritance tax law dissipate previously existing jurisdiction in this case. (Pet. for Cert. 18-19). It is clear that California's deleting of petitioner Alvord from its tax collection scheme, a unilateral action taken after oral argument on the appeal of this case, cannot defeat jurisdiction under section 1335. Few principles have been longer, or more firmly, established than that jurisdiction is determined when the original complaint is filed and that later occurrences are irrelevant. *Smith v. Sperling*, 354 U.S. 91 n. 1 (1957). Chief Justice Marshall unequivocally announced the governing rule in 1824:

> "It is quite clear that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that, after vesting, it cannot be ousted by subsequent events." *(Mollan v. Torrance*, 9 Wheat. 537 (1824)).

That rule is, of course, still followed today. *See, e.g., Hill v. Rolleri*, 615 F.2d 886, 889 (9th Cir. 1980); *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1032-33 (2d Cir. 1980). Were that not the law, diversity jurisdiction would be purely ephemeral because a defendent -- or, on appeal, any litigant dissatisfied with the result below --could always change his domicile to match that of an opposing party.

Similarly, California's voluntary action of revising its tax laws after suit was filed cannot defeat jurisdiction in this case. Otherwise, California could, theoretically at least, periodically pass the tax collection mantle from one official to another and insure that a court would never have jurisdiction of the proper party. That is plainly an unacceptable result and, just as plainly, is not the law.

Petitioners suggest that even if this now-repealed quirk in California inheritance tax procedure does establish jurisdiction in *this* case, the decision of the Court of Appeals does not provide a jurisdictional basis for other similar cases, and therefore this court should entertain an original action as precedent for resolving future domicile disputes. That view is wrong for at least two reasons. First, the jurisdictional decision below is quite narrow because the Fifth Circuit properly did not address a significant issue which would permit wide use of section 1335 for resolving domicile disputes. If, as respondent Lummis has argued below, the citizenship of state officials can be used to fulfill the diversity requirement of section 1335 because the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), not only strips state officials of their official character for purposes of the Eleventh Amendment but also renders them individual citizens for purposes of diversity analysis, statutory interpleader would provide a widespread remedy for domicile disputes of this nature. While respondents White and Bullock disagree with that argument, Petitioners' assertion that the decision below necessarily forecloses future use of section 1335 in similar cases is inaccurate. Since a resolution of that issue was unnecessary to the decision of this case, the Court of Appeals quite properly did not decide it. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1939) (Brandeis, J., concurring); *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 71-72 (1961).

Second, even if this Court were inclined to venture unnecessarily into uncharted waters to devise a remedy for hypothetical future disputes, it is sheer folly to suggest that an original action in this Court would be that remedy. For even Petitioners now concede that the possibility of an original action cannot exist unless the tax claims of the competing states, together with the federal estate tax, exceed 100% of the estate's assets, such that one state's claim will be at least partially uncollectible.[4] (Pet. for Cert. 14 n. 14). Effective shortly after Hughes' death, the maximum rate of the federal estate tax was reduced from 77% to 70%, with no corresponding reduction in the amount of the maximum available credit for state death taxes. *See* 26 U.S.C. §§2001, 2011 (1976). Thus, claims by only two states -- even where one has extremely high maximum death tax rates exceeding the federal credit, such as California's rate of 24%, rather than the customary "pick-up tax" which falls within the federal credit -- would not exceed that 100% jurisdictional limit even on the largest of estates. On a "small" estate of two million dollars, which would incur a maximum federal estate tax rate of 45%, it would take competing domicile claims from at least *eight* states whose maximum tax rate equals the federal credit of 7.2% in order to provide the necessary predicate for original jurisdiction in this Court. Quite obviously, such a remedy is not the panacea that Petitioners contend it to be.

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[4]Respondents White and Bullock firmly believe that this type of dispute is not of the nature, magnitude or dignity to be considered a suit between states or to warrant exercise of this Court's original jurisdiction -- regardless whether the tax claims involved exceed 100% of the estate. *See* Part II(A), *infra*.

The Court of Appeals wisely refused to enter unnecessarily the quagmire of difficult and esoteric questions awaiting any attempt to provide a broad remedy for domicile disputes. The jurisdictional decision below provides an adequate basis for resolving *this* dispute in a federal district court. To criticize that decision because it "only" resolves this dispute is to fault the Court of Appeals for following the mandate of the Constitution and the decisions of this Court that restrict federal courts to deciding cases and controversies before them and forbid giving advisory opinions. *See, e.g., Flast v. Cohen,* 392 U.S. 83 (1968). Just as Justice Frankfurter once noted that "[a] boundary line is none the worse for being narrow," *McLeod v. Dilworth,* 322 U.S. 327, 329 (1944), the limited jurisdictional holding below properly fulfills its intended purpose: the resolution of the dispute between the litigants before the court.

The limited nature of the decision below gives this case "such an isolated significance" that this Court should not grant plenary review by writ of certiorari. *Rice v. Sioux City Cemetery,* 349 U.S. 70, 76 (1955). If, and when, the truly bizarre confluence of events which gave rise to this dispute should recur, the Court will have not only an opportunity -- but, more importantly, perhaps a reason -- to address the issues in this petition. As Justice Frankfurter clearly indicated,

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes

> into play regard for the Court's duty to avoid decision of constitional issues unless avoidance becomes evasion. [citation omitted]" *Id.*, 346 U.S. at 74.

The issues raised by the petition are truly academic, for they are unnecessary to the decision of this case and the likelihood of a recurrence of these facts seems extremely remote. The writ of certiorari is not warranted under the circumstances. *Id.*

## II.

## WITH RESPECT TO THE POINTS RAISED IN THE PETITION, THE OPINION BELOW DOES NOT CONFLICT WITH THAT OF THIS COURT OR ANOTHER CIRCUIT COURT OF APPEALS.

Throughout the tortuous course of this litigation, the taxing officials of the State of Texas have believed and argued that *no* federal court has jurisdiction to relitigate the Texas state court determination that Howard Hughes was domiciled in Texas for purposes of the Texas inheritance tax. That position has been grounded primarily upon the Eleventh Amendment and the doctrine of collateral estoppel, and secondarily upon concepts of federalism embodied, *inter alia*, in the Tenth Amendment, the Tax Injunction Act (28 U.S.C. §1341), and the abstention doctrines.

Now, more than five years after Hughes' death and three years after the entry of the final judgment of Texas domicile by the Texas probate court, the Texas taxing officials are still prevented from proceeding with the appeal from the Texas domicile judgment and resolving disputes over valuation of the estate so that they may finally collect their tax bill from the Hughes estate. The statutory interest on that unpaid tax is

woefully insufficient to keep pace with the erosive effects inflation is working on whatever sum is finally collected.*See* Tex. Tax.-Gen. Ann. title 122A, art. 14.17 (Supp. 1981). Now facing the additional delay of at least one year if this Court grants a petition for certiorari, and recognizing the collection nightmares and possible relitigation which Petitioners will undoubtedly manufacture in state courts if no federal forum exists, the Texas officials must acknowledge that any attempt to vindicate before this Court their jurisdictional beliefs would, at best, result in the most pyrrhic of victories.

With Petitioners not content to litigate their tax claim in California state court and apparently intent on forcing relitigation of the Texas domicile judgment, the Texas taxing officials have concluded, as did the Fifth Circuit, that the most appropriate and efficient forum for that relitigation is the United States District Court for the Western District of Texas. For these reasons, the Texas officials filed no petition for certiorari to seek review of the Fifth Circuit's decision on the Eleventh Amendment and collateral estoppel issues. Nor do Petitioners seek review of the Eleventh Amendment ruling. Therefore, in all aspects now before the court, the opinion below provides a sound jurisdictional basis for resolving this particular case without conflicting with other decisions of this Court or forcing unnecessary resolution of delicate constitutional questions.

### A. This Case Does Not Fall Within This Court's Exclusive Jurisdiction

Petitioners contend that the facts of this case constitute a controversy between the states of California and Texas. They then conclude that the matter comes within this Court's original and exclusive jurisdiction, with 28 U.S.C. §1251(a)(1) thus precluding federal district court interpleader jurisdiction under 28 U.S.C.

§1335.[5] Not only do Petitioners drastically misconceive the nature of this dispute and the identity of their true adversary, they misconstrue the import of section 1251(a)(1).

Despite Petitioners' protestations to the contrary, the State of Texas and the State of California are not on a collision course over the issue of Hughes' domicile for purposes of state death taxation. In fact, the two states are on parallel courses. Each is pursuing an independent tax claim against the Hughes estate, and "the Constitution permits *both* states to impose the tax." *California v. Texas, 437 U.S. 601, 612 (1978) (Stewart, J., concurring). See Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937). As Justice Stewart so ably pointed out, while both states do have a similar dispute with the same adversary, no justiciable controversy exists between the two states themselves.[6] *California v. Texas, supra*, 437 U.S. at 611.

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[5]This petition is the first time any party to this litigation has asserted that no federal district court can entertain this case because jurisdiction rests exclusively with this Court. In the lower courts, Petitioners, in an effort to induce a transfer to a federal district court in Colorado, argued that such a transfer would cure all jurisdictional defects. The District Court and Court of Appeals would be amazed and boggled to learn that Petitioners now assert that no district court, regardless of location, can exercise jurisdiction over this case. This jurisdictional legerdemain shows that Petitioners either think little of their argument under 28 U.S.C. §1251(a)(1) or have no regard for the time and effort expended by the lower courts in deciding Petitioners' tandem motions to add parties and change venue. Hopefully -- and justifiably – they think little of their section 1251(a)(1) argument.

[6]A more thorough discussion of the various reasons why no controversy between states exists will be presented in the brief in opposition to the State of California's motion for leave to file an original action against the State of Texas, which will subsequently be filed. Quite obviously, superficial ploys such as Petitioners' choice of the style of this proceeding – selecting a Texas official,

*(footnote continued on following page)*

More importantly, Petitioners' efforts to imbue this proceeding with arguments supporting an original action are misdirected. For even assuming, *arguendo*, that this situation could be conceptualized as a suit between states, federal district court jurisdiction under 28 U.S.C. §1335 would not be destroyed by section 1251(a)(1). For while Article III, section 2 of the Constitution extends the original jurisdiction of this Court to cases "in which a State shall be Party," it is well settled that Congress can grant concurrent original jurisdiction of such suits to the lower federal courts. *Ames v. Kansas,* 111 U.S. 449 (1884); *United States v. Louisiana,* 123 U.S. 32, 36 (1887).

Petitioners argue that section 1251(a)(1) is the final word from Congress fixing original jurisdiction of suits between states exclusively with this Court. Section 233 of the Judicial Code, the predecessor of section 1251(a), sparked similar arguments about its exclusive grant to this Court of original jurisdiction over cases "where a state is a party." It was consistently held that statutes otherwise vesting jurisdiction in federal district courts superseded the exclusivity provisions of section 233 in cases where a state happened to be a party. *United States v. California,* 297 U.S. 175 (1936); *Case v. Bowles,* 327 U.S. 92 (1946); *Minnesota v. United States,* 125 F.2d 636 (8th Cir. 1942). The Federal Interpleader Act similarly supersedes the very general exclusivity provision of section 1251(a)(1) and creates district court

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*(footnote continued from previous page)*

rather than plaintiff Lummis, as the lead party and utilizing official titles rather than names – add nothing to the analysis or resolution of this issue.

jurisdiction over this action in the nature of interpleader.[7]

B. Venue Is Properly Laid In Austin, Texas.

Congress has prescribed special limitations on venue for interpleader actions brought pursuant to section 1335. Those limitations are set forth in 28 U.S.C. §1397, which provides that such actions "may be brought in the judicial district in which one or more of the claimants reside." All parties concede that the Texas taxing officials, respondents White and Bullock, reside in Austin, Texas and are claimants for inheritance taxes from the Hughes estate. Venue in Austin thus clearly satisfies the requirements of section 1397.

Petitioners, however, assert that the nature of this particular interpleader action makes venue in Austin inappropriate and urge that "the interest of justice" mandates transfer of the case to Denver, Colorado, a

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[7]Petitioners' view that this court is the only tribunal empowered to hear suits between states cannot be squared with numerous decisions to the contrary. *See, e.g., Arizona v. New Mexico*, 425 U.S. 794 (1976); *Massachusetts v. Missouri*, 308 U.S. 1 (1939); *Matter of Trowbridge*, 266 N.Y. 283, 194 N.E. 756 (1935). Nor does it comport with the statement made by Petitioners' counsel at oral argument before the Fifth Circuit:

> MR. FALK: No, we don't want to play any procedural game. And I understand why the result in this case is unacceptable. It's unacceptable to us as well. We agree with the estate that federal interpleader ought to be used in this case. We do not assert the Eleventh Amendment, and we are willing to submit to the federal interpleader act. (Tr. of March 31, 1980, 5th Cir. Arg. at p. 19)

"neutral forum."[8] The decisions of the lower courts denying Petitioners' motion to transfer are indisputably correct for two reasons.

First, the District of Colorado is not a forum to which this case may be transferred. Because no claimant resides in Colorado, that district is not one where the action "might have been brought" originally under section 1397, and therefore no transfer to Colorado is available. 28 U.S.C. §1404(a); *Hoffman v. Blaski*, 363 U.S. 335 (1960). Petitioners attempted to skirt this obvious impasse by filing, as a companion to their 1404(a) motion, a motion to add as defendants some twenty-two[9] self-proclaimed heirs of Hughes, one of whom was

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[8]Petitioners also moved, alternatively, that the case be transferred to Los Angeles, California. Having been unable to persuade either the District Court or Court of Appeals to transfer this action, Petitioners now argue here -- for the first time -- that 28 U.S.C. §1251(a)(1) precludes *any* federal district court from exercising jurisdiction over this case. *See* Part II(A), *supra*. And, to buttress their position that an original action in this Court is the only appropriate remedy for this dispute, Petitioners further contend that because the strictures of section 1397 do not permit transfer of this case to Colorado, section 1335 is "the wrong remedy." (Pet. for Cert. 14). While it is indeed true that Colorado is not a potential transferee forum, statutory interpleader does remain a viable remedy in this case.

[9]The "lucky" 22 were those who were signatories to a settlement agreement purporting to divide the estate among themselves regardless of Hughes' domicile. Because Annette Gano Lummis --Hughes' now-deceased aunt who resided in Houston -- was the sole heir under the intestacy law of California and Nevada, and because no determination of heirship has been made by the Texas probate court, it is difficult to comprehend Petitioners' selection process. If the joinder of all *potential* heirs were required, more than 400 persons who have filed appearances in the Texas probate proceeding claiming heirship under Texas law would have to be added in this case.

allegedly a resident of Denver, Colorado.[10] But heirs --much less *potential* heirs -- are clearly not "claimants" in this interpleader action involving death tax claims because their rights in the estate do not attach until tax questions like those involved here are resolved, the administration of the estate is closed, and the remaining assets are distributed to them by the administrators.

Furthermore, the administrators of the estate, having the present possessory right in, and control of, the estate and the duty to preserve the estate and prosecute suits to protect estate assets, are the real parties in interest and only proper parties to this action. *See, e.g., Tex. Prob. Code* §§ 37, 233; Calif. Prob. Code § 571; Fed. R. Civ. P. 17(a). By determining that the alleged heirs should not be joined, the courts below followed long-standing precedent that executors and administrators are the proper parties and may bring suit in their own names without joining the estate's beneficiaries. *See Childress v. Emory*, 21 U.S. (8 Wheat.) 642, 669 (1823); *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931); *Boeing Airplane Co. v. Perry*, 322 F.2d 589 (10th Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

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[10]Petitioners failed to make sufficient factual showing below that a potential heir even resided in Colorado on July 14, 1978, the date this case was commenced. That date is, of course, the relevant one for determining whether the action "might have been brought" in Colorado originally, even if the potential heirs had been joined as parties. *Allegaert v. Chemical Bank*, 432 F.Supp. 685 (E.D.N.Y. 1977); *Harry Rich Corp. v. Curtiss-Wright Corp.*, 308 F.Supp. 1114 (S.D.N.Y. 1969); *see Hoffman v. Blaski* 363 U.S. 335 (1960). Petitioners merely introduced an affidavit of their counsel asserting that one alleged heir signed the settlement agreement in Colorado, in June of 1977, and in no way established either that the person in question was a resident of Colorado, or had resided there on July 14, 1978, or was even an heir of Hughes.

This Court recently held that the citizenship of the trustees, rather than the trust beneficiaries, is determinative for purposes of diversity jurisdiction because the trustees are the real parties in interest. *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980). The logic of *Navarro* confirms that the administrators of the estate, rather than the potential heirs, are the appropriate parties in this case. Since no claimant resided in Colorado when the case was commenced, the courts below properly denied Petitioners' motion to transfer because, "[t]he requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding v. Illinois Central R.R.*, 346 U.S. 338, 340 (1953).

Second, even if the potential heirs had been added as claimants and it had been proved that one such person did reside in Colorado on July 14, 1978,[11] Petitioners' motion to transfer was properly denied because the interest of justice does not mandate a transfer to Colorado. The argument that a transfer is necessary to reach a "neutral forum" ignores the very logic underlying the diversity jurisdiction of federal courts. Petitioners are not being compelled to submit to the jurisdiction of a Texas state court, but rather a federal district court, a "national tribunal," *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888), whose jurisdiction under section 1335 would be bottomed on diversity of citizenship. The very purpose underlying that jurisdictional grant was that a federal district court would provide a forum in which out-of-state litigants could escape local prejudice. 13 C. Wright & A. Miller, *Federal Practice & Procedure*, §3601 at p. 574 (1972).

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[11] *See* note 10, *supra*.

Petitioners contend that even if the court were fair, Texas jurors would not be. This argument rests, at bottom, on the assumption that the dizzying sum of $12.34[12] that each juror might stand to gain in taxes by a verdict of Texas domicile would make the jury panel ignore their sacred jurors' oath and render a verdict based upon their pecuniary interest rather than the evidence before them.[13] Merely to state this reasoning shows why the cases relied on by Petitioners are inapposite. For in contrast to this case, the fact finder in *Tumey v. Ohio,* 273 U.S. 510 (1927), received approximately $100 per month from his pecuniary interest in convictions, while the justice of the peace in *Connally v. Georgia,* 429 U.S. 245 (1977), made more than $50,000 in three years by issuing warrants, and those fees were his salary. Here, there is no substantial, repeating and direct interest by Texas jurors as existed in *Tumey* and *Connally.* The one-time, indirect interest of $12.34 that a juror might have is clearly *de minimus* and does not mandate transfer of the case. *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.,* 389 F.Supp. 568 (E.D. Va. 1975). *Cf. Dugan v. Ohio,* 277 U.S. 61 (1928) (distinguishing *Tumey*).

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[12]This is the maximum figure, based on the California inheritance tax referee's $1.1 billion appraisal of the estate. Under the IRS appraisal of approximately $465 million, the sum, based on Petitioners' method of calculation, would be roughly $5.22, whereas using the Estate's own valuation of $168 million, the figure would be all of $1.89 – not even enough to buy a decent chicken fried steak.

[13]It is highly speculative that a layman will even know that a finding of Texas domicile would have any bearing on inheritance taxes collected by the State. Mention of that fact may be avoided by a proper motion in limine, as Texas used in the previous state trial to avoid any conceivable prejudice.

Petitioners' professed fears about publicity concerning the prior state court trial and verdict are similarly unfounded. Their arguments in this regard were weak and exaggerated when first made before the District Court in the fall of 1978, some eight months after the end of the Texas trial. Now, more than three years after that trial, any prejudice that could possibly have arisen from whatever publicity there was in Austin about the Houston trial has completely dissipated. By the time this case reaches trial, no residual effect of prior publicity could possibly exist.

The voir dire process will screen any potential juror who may actually be affected by the factors which worry Petitioners. And the District Court will instruct the jury to decide this case solely on the basis of the evidence presented to it. The system of voir dire and strict control of the jury by instructions from the bench is designed to handle problems such as Petitioners now fear exist, and there has been no showing that it will be incapable of handling potential juror bias in this case. In fact, the presumption is that the system will work. "[I]t is presumed that the jury will be true to their oath and conscientiously observe the instructions of the court...", *United States v. Sorcey*, 151 F.2d 899, 903 (7th Cir.), *cert. denied*, 327 U.S. 794 (1945), and "we cannot presume that a trial will proceed other than fairly in any federal forum in which venue exists." *Chicago, R.I. & P. Ry. v. Igoe*, 212 F.2d 378, 382 (7th Cir. 1954), *cert. denied*, 350 U.S. 822 (1955). *Accord, Patterson v. Louisville & Nashville R.R.*, 182 F.Supp. 95 (S.D. Ind. 1960).

Finally, for several reasons, the interests of justice[14] strongly point to the Western District of Texas as an ap-

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[14]The other factors under 28 U.S.C. §1404(a) -- the convenience of the parties and witnesses -- overwhelmingly favor Austin venue. In balancing these other factors based on the evidence presented, the

*(footnote continued on following page)*

propriate forum for this case. Trial of this case could well last several months, which will place an extraordinary burden on the jurors chosen to hear the case. As this Court has stated, "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463 (S.D.N.Y. 1977). It is not in the interests of justice to saddle the citizens of Denver with the time-consuming and expensive burden of this trial.

The Texas taxing officials have already expended a vast amount of time, and not an insubstantial amount of money and personal effort, litigating the issue of Hughes' domicile in state court. The Hughes estate, which selected Austin venue, has also incurred large litigation expenses from the Texas trial. Only Petitioners, who sat on the sidelines watching that initial fray, have their war chest intact for future litigation. These same Petitioners who waited until the eve of the Texas trial to assert any domicile claim with respect to Hughes now ask to be rewarded for their sloth with a transfer which will drastically increase litigation costs to all other parties. Since Petitioners are now forcing the Texas officials to relitigate the domicile issue, with the attendant waste of most of the expense of the prior Texas trial, the interest of justice should mandate that venue be laid in Austin, with the enormous savings of time and money that an Austin trial will mean to the Texas officials. And, of course, the concomitant savings in litigation expenses by the estate will benefit all parties, as it will increase the corpus of the estate upon which taxes may be assessed.

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*(footnote continued from previous page)*

District Court found Austin superior to Los Angeles, and Petitioners have not appealed that ruling. Denver, having no connection with this litigation, offers absolutely nothing in the way of convenience for anyone.

Having evaluated the law and the evidence in light of the concerns set forth in section 1404(a), the District Court correctly determined that Austin, Texas is the most appropriate forum for this case. The Court of Appeals affirmed that ruling. The writ should not issue to review those decisions.

### C. The Citizenship Of An Interested Stakeholder Can Be Utilized To Establish Diversity Under 28 U.S.C. §1335.

The Court of Appeals based jurisdiction under section 1335 upon the citizenship of plaintiff Lummis, an administrator of the Hughes estate found to be an interested stakeholder. *Lummis v. White, supra,* 629 F.2d at 403. That ruling comports with the overwhelming weight of the case law and commentary, which permit and urge the broadest possible application of interpleader. *See, e.g., Builders & Developers Corp. v. Manassas Iron & Steel Co.,* 208 F. Supp. 485, 488 (D. Md. 1962); *Pan Am. Fire & Cas. Co. v. Revere,* 188 F. Supp. 474, 477 n. 8 (E.D.La. 1960); 7 C. Wright and A. Miller, *Federal Practice & Procedure,* §1710 at pp. 405-407 (1972); *cf. State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523 (1967) (§1335 requires only "minimal diversity").

Unable to cite a single case to support their position, Petitioners instead offer two examples to demonstrate how consideration of an interested stakeholder's citizenship will have an untoward effect on established principles of diversity jurisdiction. (Pet. for Cert. 16-17). In the first example, Petitioners posit a simple bilateral dispute between an insurer from one state and a claimant from a second state and contend that the ruling below would provide jurisdiction for such an action under section 1335. Such a case obviously cannot be

brought under section 1335 because it is not an interpleader or in the nature of interpleader -- a threshold requirement under the statute -- for the simple reason that the stakeholder is faced with only a single claim to the stake in his possession. By contrast, in the case at bar, while the citizenships of only Lummis and Alvord were used to satisfy the diversity requirement of section 1335, the additional claims of the state taxing officials were viewed by the Court of Appeals as creating the requisite situation in the nature of interpleader.

Petitioners' other example is no more instructive than the first. It suggests that an interested stakeholder, as a "claimant" under sections 1335 and 1397 (venue), would be able to bring suit in the place of his own residence, thereby causing unthinkable forum abuse. The specific example is of a Delaware insurer who denies liability to, and then interpleads, a dozen California (or west coast) claimants and forces them to litigate their claims in Delaware, despite the fact that none of those claimants had any prior contacts with Delaware. (Pet. for Cert. 16-17). Clearly, such a situation would easily be remedied by filing a motion to transfer the case to California under 28 U.S.C. §1404(a) for the convenience of the witnesses and parties, and to promote the interest of justice. Courts will not permit plaintiffs "an unfettered choice" of districts and will not allow litigation to proceed in a forum with no relation to the case. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 185 (1979); *Gulf Oil Co. v. Gilbert, supra*, 330 U.S. at 508-509. In fact, the obvious merit to such a 1404(a) motion underscores why Petitioners' own similar motion in this case was properly denied.

In sum, Petitioners' contention that the citizenship of an interested stakeholder cannot establish diversity under section 1335 is most clearly laid to rest by the analysis of Professor Wright:

> "Nevertheless, once an interested stakeholder deposits the fund with the court or posts an appropriate bond, he does become a claimant for all practical purposes and his citizenship should be relevant in deciding the jurisdiction question. Moreover, since, by hypothesis, the stakeholder's citizenship will be diverse from that of at least one of the claimants, the interpleader has interstate aspects and therefore seems to fall within the class of cases intended to be covered by the statute." (7 C. Wright & A. Miller, *supra*, at p. 407)

The decision of the Court of Appeals in this respect is correct, and the writ should not issue to review it.

D. Petitioners Do Not Seek Review Of The Holding Below That The Eleventh Amendment Does Not Bar This Action.

The Court of Appeals rejected the contention of Petitioners and of respondents White and Bullock that this action is barred by the Eleventh Amendment. *Lummis v. White, supra*, 629 F.2d at 402. The Court agreed with, and deferred to, the four concurring Justices in *California v. Texas*, 437 U.S. 601 (1978), who suggested that *Edelman v. Jordan*, 415 U.S. 651 (1974), had undercut the Eleventh Amendment holding of *Worcester County Trust Co. v. Riley, supra.*

Petitioners do not seek review of the Eleventh Amendment holding below, nor do respondents White and Bullock. It is therefore unnecessary to grant the writ to resolve the obvious conflict between this Court's opinion in *Worcester County Trust Co. v. Riley, supra*, and that of the Court of Appeals below.

## CONCLUSION

For these reasons, the petition for certiorari should be denied.

DATED: April 15, 1981

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## PROOF OF SERVICE

I, William David Deaderick, a member of the Bar of this Court, do hereby certify that three true and correct copies of the above and foregoing Respondents White's and Bullock's Brief in Opposition have been served on each party separately represented in this proceeding by depositing the same in a United States post office, with first-class postage prepaid, certified, return receipt requested, on this 15th day of April, 1981, addressed as follows:

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